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Draft Status Report of Work Group To Be Given to the Joint Legislative Task Force on Energy Facility Siting Bellingham, October 17, 2000

Note: The facilitator prepared this status report following the work group's meeting on October 11. It has not been approved by work group participants.

I. INTRODUCTION

About the Work Group: At its first meeting on August 24, 2000, the task force established three work groups. They met on September 12-13 in Olympia and on September 26-27 in Bellingham. At the Bellingham meeting the three groups merged into one. The combined work group met again on October 3 in Fife and on October 11 in Olympia. Work group meetings are open to anyone who wishes to participate.

Two Basic Questions:

1. Should the state have a state siting process and an agency to administer it?

Discussion: Work group participants started with this question at the first work group meeting and found that everyone agreed that the state needed an entity and procedure for siting certain kinds of energy facilities.

2. Should the siting process be remade from the ground up or should the task force concentrate on trying to improve Washington's current system?

Discussion: What triggered this question was the three hour meeting on October 3 in Fife with David Stewart-Smith, manager of Oregon's process for siting energy facilities. Many participants were intrigued by the Oregon system. Before that discussion participants had been focusing on making repairs to Washington's current system. But after hearing about the Oregon system, some participants wondered whether the work group should recommend to the task force that a more wholesale approach be taken. The work group discussed this question on October 11 and decided for now to continue working to improve the existing system—while remaining interested in considering a fundamentally different system along the lines of Oregon's. Participants recognized that there were substantial differences between the general approaches to land use planning and regulation in Oregon and Washington, and also that it might take several years to remake the Washington system. In the meantime, EFSEC might be faced with numerous applications.

Topics in the Budget Proviso: The budget proviso directs the task force to review and make recommendations on several topics. With two exceptions the headings below are verbatim from the budget proviso. The exceptions are (1) the separation of Jurisdiction and Membership, which are combined in the proviso, and (2) the combination of siting on public lands with preemption, since the former is a subtopic of preemption.

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Under each topic is a list of subtopics that the work group hopes to discuss. It is not a consensus list, but a compilation of questions, issues, or possible changes to the siting process that at least one participant in the work group thinks must be considered if the current siting process is to be adequately reviewed. They made the list on September 27, knowing that the limited time until the task force report is due on December 1 may not make it possible to consider all topics.

The work group has developed several draft recommendations so far. It is important to note, however, that these recommendations are still conceptual and tentative. One reason for this is that participants need to check with their associates. Another is that recommendations may need to change as discussion continues on other issues, since many issues are so interrelated. Finally, participants will need to see the details.

II. BUDGET PROVISIO TOPICS

A. Jurisdiction of the state siting authority

1. Sizes and types of energy facilities: Suggestions by individual participants:

- a. Let non-hydro renewables, such as wind farms and solar projects “opt in” to the state siting process.

Discussion: The intent of this suggestion is to help implement the state energy policy which encourages the development of non-hydro renewables such as wind and solar facilities. Such facilities are typically less than 250 MW and so do not come under EFSEC’s jurisdiction. Allowing a developer to “opt in” to the state siting process would offer a siting option that might be useful in those cases where one or more local governments would be required to review the proposal.

Other participants raised questions about this suggestion and the work group will consider it again later.

- b. Clarify how the threshold for thermal generating plants, currently 250 megawatts, is calculated.

Discussion: Even when a threshold appears to be precise, it can be difficult to calculate. Several participants are studying ways to calculate the 250 MW threshold for thermal generating plants and will report back to the work group.

- c. Lower the 250MW threshold and tie it to a CO2 standard.
- d. Clarify the definitions in the statute.
- e. Review the size threshold for each type of facility.

2. Other suggestions by individual participants:

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- a. Clarify how the process should deal with the cumulative effect of multiple projects.
- b. Establish a policy for siting distributed energy facilities.
- c. Allow applicants to opt out of the state siting process if the project is located entirely in one local jurisdiction.
- d. Change the state energy policy to provide more direction for the state siting process.
- e. Amend the purpose statement and legal standard for approval to make the siting process consistent with state energy policy.
- f. Amend the siting statute so that it has a very clear intent and policy section.
- g. Reconcile the mission of EFSEC and public perception.

B. Monitoring and oversight of certified facilities

1. Suggestion by participant: Have appropriate state agencies monitor and oversee certified facilities directly. Remove EFSEC from that loop.

Draft Recommendation: As an option, allow for compliance monitoring and determination of compliance to be delegated to the appropriate agency. This option would apply to operating plants, not those under construction or certified but not yet constructed. Both the state agency with jurisdiction and EFSEC would have to agree to the delegation. To allow this option, the word “shall” at RCW 80.50.040 (9) would be amended to read “may”.

Discussion: The intent of this recommendation is to make monitoring and oversight more efficient for those situations where EFSEC is essentially another layer of bureaucracy, while retaining the benefits of EFSEC oversight where it is beneficial. It is important to note, however, that this recommendation is linked to the funding issue. All of EFSEC’s funding now comes from either siting applications or from the monitoring of certified facilities, in particular, Energy Northwest. Of the two funding sources, only monitoring is predictable.

2. Suggestion by participant: Set a limit for the duration of a permit for certified but not yet constructed projects.

Discussion: [Members of the Council left the room for this discussion.] There are [seven?] facilities certified by EFSEC but not yet constructed. The concerns underlying this suggestion by a participant are that such facilities, if built, may then incorporate outdated technology with greater environmental impact; having a backlog of certified but unbuilt facilities may discourage developers from applying for newer, more efficient technologies; and, as happened with a transmission line in Oregon, neighbors to the proposed facility may change in the years that the proposal was dormant, bringing forth a new round of public concern and opposition.

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The statute is silent on this subject, but EFSEC as a policy is now granting certifications for five years, with a one-time renewal for another five years. Work group participants had differing views about the necessity of limiting the duration and listed several questions to be researched and then will resume discussion of the issue. The questions are:

- a. Do EFSEC's attorneys consider an agency policy to be sufficient, or should a limitation also be in statute?
- b. What is the practical effect of the Best Available Control Technology (BACT) for the air and water permits that the Department of Ecology administers? These permits are good for eighteen months, unless renewed on the basis of meeting BACT. Does this in effect eliminate the need for a statutory limitation on a site certification?

C. Membership of the state siting authority

This is an important topic whose resolution is tied to other issues, especially procedures and funding. The work group will address it in more detail at a future meeting.

D. Procedures

1. Adjudication: Suggestions by individual participants:
 - a. Fix problems with the public and adjudicative phases of the process so that they can be combined into one record. In other words, how do you combine the adjudicative process and public participation into one final record?

Draft Recommendation: The following statutory change would correct this problem:

80.50.100. Recommendations to governor--Approval or rejection of certification--Reconsideration

(1) The council shall report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant. Pursuant to RCW 34.05.076, the council's report to the Governor shall be based on the administrative record developed during the public hearing held under RCW 80.50.090(3), along with the environmental impact statement prepared pursuant to RCW 43.21C.030 and relevant information presented at other public hearings held by the council pursuant to this chapter. If the council recommends approval of an application for certification, it shall also submit a draft certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended.

(2) Within sixty days of receipt of the council's report the governor shall take one of the following actions:

- (a) Approve the application and execute the draft certification agreement; or
- (b) Reject the application; or
- (c) Direct the council to reconsider certain aspects of the draft certification agreement.

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The council shall reconsider such aspects of the draft certification agreement by reviewing the existing record of the application or, as necessary, by reopening the adjudicative proceeding for the purposes of receiving additional evidence. Such reconsideration shall be conducted expeditiously. The council shall resubmit the draft certification to the governor incorporating any amendments deemed necessary upon reconsideration. Within sixty days of receipt of such draft certification agreement, the governor shall either approve the application and execute the certification agreement or reject the application. The certification agreement shall be binding upon execution by the governor and the applicant.

(3) The rejection of an application for certification by the governor shall be final as to that application but shall not preclude submission of a subsequent application for the same site on the basis of changed conditions or new information.

b. Fix problems associated with the ex parte wall.

c. Resolve more issues up front, before adjudication.

d. Resolve questions about the governor's role and the adjudicative process.

2. Suggestion by participant: Pre-site facilities as industrial facilities are being done now. Can we use GMA to pre-site?

Discussion: The work group discussed this suggestion on October 11 but there was not broad interest in pursuing it--not because it wasn't a good idea, but because it may be a problem that doesn't need fixing and that in practice is already available to a developer. Generating plants are industrial uses and jurisdictions have already zoned industrial land. Many communities are seeking industries that can provide jobs.

The group also discussed whether it would make sense to add energy facilities to the definition of "essential public facilities" in the Growth Management Act, but those participants conversant with GMA surmised that it probably did not. The discussion concluded with a willingness to revisit the topic if the person who suggested it, after researching some of the points made in the discussion, wanted to bring it back at another meeting.

3. Growth Management Act

a. Suggestion by participant: Make the EFSEC statute consistent with the Growth Management Act.

Draft Recommendation: *The following statutory change would correct this problem:*

80.50.020. Definitions

....

(15) "Land use plan" means a comprehensive plan or land use element thereof adopted by a unit of local government pursuant to chapters 35.63, 35A.63, ~~((or))~~ 36.70, or 36.70A RCW;

....

b. Suggestion by participant: Address the problems of determining consistency of EFSEC criteria and local ordinances. This is a problem especially when a local government classifies an energy facility as a conditional use.

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Draft Recommendation: The following statutory change would correct this problem:

80.50.090. Public hearings

(1) The council shall conduct ((a)) an informational public hearing in the county of the proposed site within sixty days of receipt of an application for site certification: PROVIDED, That the place of such public hearing shall be as close as practical to the proposed site.

(2) ((The council must determine at the initial public hearing whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances. If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.)) The purpose of this hearing is to inform the public of the project. At the public hearing, the council shall describe the council's application processing process; the applicant shall make a presentation describing the project; and the public shall have an opportunity to provide comments.

(3) Prior to the issuance of a council recommendation to the governor under RCW 80.50.100 a public hearing, conducted as an adjudicative proceeding under chapter 34.05 RCW, the Administrative Procedure Act, shall be held. At such public hearing any person shall be entitled to be heard in support of or in opposition to the application for certification.

(4) Additional public hearings shall be held as deemed appropriate by the council in the exercise of its functions under this chapter.

4. SEPA: Suggestion by participant: Clarify how should SEPA apply. Can we eliminate some of the duplication in applications and environmental impact statements?

5. Other suggestions by individual participants:

- a. Address issues of public participation.
- b. Make it easier and less expensive for state agencies to participate.
- c. Get more certainty in the process.
- d. Make the siting process more efficient.

E. The scope of preemption of proprietary and regulatory functions of local governments and other state agencies; the siting of facilities on public lands.

1. Budget proviso subtopic: Preemption of proprietary powers of state agencies--preemption of state public lands:

Draft Recommendation: Work group participants acknowledge that this is an issue they are unlikely to resolve, but agree that it is important for the Legislature to clarify. If task force members agree and vote to include this recommendation in the report, the various interests will explain their views in an appendix to the report.

Discussion: "Preemption" is the power of one law to supersede another. The legislature has granted EFSEC certain preemption powers. There is no consensus on the extent of this power, nor is there any agreement on how to clarify this power.

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EFSEC has preemption power over the “regulation and certification of the location, construction, and operational conditions of certification” of certain energy facilities. In addition, EFSEC’s certification of an energy facility “shall be in lieu of any permit, certificate or similar document” required by other state agencies.

Some argue that EFSEC’s preemption power extends to granting companies the right to use state lands, including lands administered by other state agencies. For example, they contend that EFSEC may grant easements across state parks. Or put another way, EFSEC has the power to step in the shoes of the State Parks Commission and grant easements.

Others assert that EFSEC’s preemption power is limited to regulatory matters, such as the issuance of permits and certificates. The granting of easements is not a regulatory matter, they claim, but a power that must be specifically authorized by the legislature. Furthermore, they raise concerns that alternate uses of public land that are granted by EFSEC may contradict the terms under which some state land was acquired, such as federal trust land managed by the Department of Natural Resources for the benefit of common schools.

This topic also raises an issue of compensation. Assuming EFSEC does have the power to grant easements or other uses of public land, should the public be compensated for the use of the land? If so, how should the compensation be calculated? There is no consensus on these issues.

2. Budget proviso subtopic: Preemption of proprietary powers of local governments:

Draft Recommendation: If the legislature addresses the question of preemption of state lands, it should at the same time clarify the issue with regard to the proprietary rights of local governments.

3. Budget proviso subtopic: Preemption of regulatory powers of other state agencies:

a. Suggestion by participant: Clarify EFSEC’s role regarding water rights.

4. Budget proviso subtopic: Preemption of regulatory powers of local governments:

F. Local government participation

1. Suggestion by participant: Provide adequate time and money for local governments to carry out their responsibilities, however they might be defined.

2. Suggestion by participant: Address issues associated with the reliance on local government for siting some facilities. For example, many local governments lack the technical expertise and money to review a proposal.

G. Standards and processes for determining need for proposed projects

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[This topic is important to some parties, but not yet discussed.]

H. The role of the a counsel for the environment

[See Funding below.]

I. Funding and related costs of participating in the state siting process:

Suggestions by individual participants:

1. Make it easier and less expensive for state agencies to participate.
2. Provide adequate financing for state agency staff time.
3. Provide adequate funding for the counsel for the environment and for council members.